
U.S. Department of Labor
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, NJ 08104

DATE: March 11, 1997

Case No. 95-ERA-13

In the Matter of :

ROBERT SEATER
Complainant

v.

SOUTHERN CALIFORNIA EDISON COMPANY
Respondent

RECOMMENDED ORDER APPROVING SETTLEMENT
and
DISMISSING THE COMPLAINT

On March 10, 1997, Respondent submitted a "Settlement Agreement" of twelve pages (hereinafter referred to as the "Agreement") in which Complainant and Respondent agreed to, *inter alia*, "fully and finally settle and terminate" this case, and that the complaint herein be dismissed with prejudice.

The Agreement contains a "Confidentiality" section, with appropriately limited requirements that the parties not reveal the contents of the Agreement, which I find contains nothing unlawful or violative of public policy. This section of the Agreement also contains a provision that the parties will request that the Department of Labor "maintain this Agreement in confidence and withhold this Agreement from disclosure to the public under all applicable exemptions of the Freedom of Information Act" (FOIA), 5 U.S.C. §552, pursuant to 29 C.F.R. §70.26.

Together with the Agreement, the parties submitted a "Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice" which makes reference to an accompanying supporting Memorandum. The Memorandum includes a request that the

terms of the Agreement "be maintained confidential" by the Department of Labor and a statement that Respondent "asserts its predisclosure notification rights under 29 C.F.R. §70.26" if a request is made for disclosure of the Agreement pursuant to FOIA. Respondent's cover letter dated March 10, 1997, states that "the information contained in the [Agreement] is confidential sensitive commercial and financial information as that term is used in 29 C.F.R §69.26(b) (*sic*)" (obviously referring to 29 C.F.R. §70.26(b)).

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The only element of the parties' settlement that is open to question is the request that the Department of Labor keep the financial aspects of the Agreement secret from the public (subject to FOIA limitations). It is true that 29 C.F.R. § 70.26(b) appears to allow this based merely on the written "designation" by a "business submitter" that the information to be kept confidential constitutes "confidential commercial information ... [that] the submitter claims could reasonably be expected to cause substantial competitive harm." Another portion of the regulation refers to "confidential commercial or financial information." This **self-designation** by a party that the financial aspects of a settlement agreement are confidential and potentially harmful to it flies in the face of, and could easily eliminate, the policy that it is important for the public and, particularly, potential future whistleblowers to know about the amount of money, if any, paid in a settlement. *See Biddy v. Alyeska Pipeline Service Company*, Case No. 95-TSC-7, slip op. at 2, (ARB, Dec. 3, 1996).

For the foregoing reasons, it seems to me that it would be best if the administrative law judge who has to recommend approval, or not, of the settlement should be permitted (even encouraged) to set forth the financial terms of a settlement in his determination, which is a public document easily and quickly obtainable. At the least, the submitter should be required to establish before the administrative law judge that this information is truly matter that would be expected to cause substantial competitive harm. (In the instant case, I find it difficult to believe that this could be established.) While it is true that the public may attempt to obtain this information under FOIA, that process can be a formidable barrier. Moreover, obtaining information under FOIA is time-consuming, and it is even more so with the procedures added in 29 C.F.R. §70.26(d),(e), and (f) requiring that the Department of Labor provide the submitter with notice of a request for disclos-ure, an opportunity for the submitter to object, and, ultimately, that the Department of Labor provide the submitter prior notice of intent to disclose.

Be that as it may, the regulations and the Secretary's effectuating policy appear to allow this limitation on the public's free access to information. *See Klock v. Tennessee Valley Author-ity*, 95-ERA 20 (ARB, May 1, 1996); *Ezell v. Tennessee Valley Authority*, 95-ERA-39 (ARB, Aug. 21, 1996); *Cianfrani v. Public Service Electric & Gas Co.*, 95-ERA-33, slip op. at 2 n.3 (ARB, Sept. 19, 1996). However, I urge the Secretary to address the matters raised above so that she/he may provide future guidance.

Having reviewed the parties' settlement agreement, and in light of the foregoing discussion, I find that it is a fair, adequate and reasonable settlement of the complaint.

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Accordingly, I APPROVE the Agreement and DISMISS THE COMPLAINT in Case No. 95-ERA-13 WITH PREJUDICE.

SO ORDERED.

ROBERT D. KAPLAN
Administrative Law Judge

Camden, New Jersey